(1) Supreme Court, U.S.
FILED

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IN THE
OFFICE OF THE CLERK

SUPREME COURT OF THE UNITED STATES

FARIDA RAHMAN,

Petitioner

v.

CITTERIO USA CORPORATION,

Respondent

A Petition for Writ of Certiorari to the
United States Court of Appeals
Third Circuit

Petition for Writ of Certiorari

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50 pp

QUESTIONS PRESENTED FOR REVIEW

1. Are consideration and analysis of the factors upon which the appropriateness of the entry of judgment as a matter of law in any particular employment discrimination case is said by this Court's decision in *Reeves, infra,* to be dependent mandatory, such that the failure by a court so to consider and analyze them is reversible error?

2. Where in a Memorandum accompanying an order a district court expressly characterizes an admittedly uncertain statement by a witness as confirmed by assertions appearing in the brief of the party favored by that testimony -- here, his employer-- and where there are other such departures from the accepted and usual course of judicial proceedings, does not its affirmance below constitute such a sanctioning of same as to call for the exercise of this Court's supervisory power?

LIST OF ALL PARTIES

The names of all parties appear in the caption of the case on the cover page.

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STATUTES AND RULES

Section 703(a) (1) of Title VII of the Civil Rights Act of 1964, as amended, 78 Stat, 253m 42 Y./s, Ct, §2000e-2(a)(i) 3

OPINIONS BELOW

The opinion of the United States Court of Appeals appears at Appendix A to the petition and is unpublished.

The opinion of the United States District Court appears at Appendix B to the petition and is unpublished in the official reporter but has been reported at 57 Fed. Appx. 516 and was published at 2003 WL 193696 (3rd Cir., Pa)

JURISDICTION

The United States Court of Appeals decided this case was January 29, 2003.

A timely petition for rehearing was denied by the United States Court of Appeals on June 24, 2003 and a copy of the order denying said petition appears at Appendix F.

The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATUTORY PROVISIONS INVOLVED

This petition involves section 703(a)(1) of Title VII of the Civil Rights Act of 1964, as amended, 78 Stat. 253, 42 U.S.C. §2000e-2(a)(1), the provisions of which, being lengthy, are set out in Appendix G.

STATEMENT OF THE CASE

Petitioner, an American citizen and Asian-Muslim female, seeks review of a U.S. Court of Appeals for the Third Circuit judgment which affirmed the U.S. District Court for the Middle District of Pennsylvania order which granted summary judgment in favor of the respondent , defendant below, in an action involving claims that it, a meat processing firm, discriminated against petitioner by refusing to hire her because of her race, national origin, religion and gender.

In March, 1994, respondent hired her and two non-Asian-Muslim males as temporary production workers. Temporary employees would become permanent union-eligible employees after sixty working days. The two males temporarily hired when she was would become permanent hires after the expiration of the 60 work days, but she was laid off on May 20, 1994, purportedly because of a slackening of seasonal demand for respondent's meats. Respondent's daily production records set forth the names of each employee, the number of hours worked that day, the job description, the amount of that day's time devoted to packaging, slicing, shipping, movement, ham room work and cleaning, and a last column captioned "Problems." These records show no problems with petitioner's work and there are several entries crediting her with having done good work. There are entries therein of specified problems with certain other workers, such as their arriving late or being absent without excuse and other negative entries. One of the workers, a non-Asian Muslim male, was permanently hired notwithstanding his absenteeism; another, also a non-Asian Muslim male was permanently hired notwithstanding his production supervisor having been told by the sanitation supervisor that he was not to send that employee back to him.

Petitioner thereafter called and stopped by the plant to say she was interested in returning to work and was told that she need not submit an application and that respondent was not hiring. She was on October 5, 1994, rehired temporarily as a production worker but on December 21, 1994 was again laid off, for the same purported reason. It was during this second period of employment that she noted that there had been, since her first stint, some rehiring and she would later testify that she never saw at respondent's plant any non-Caucasian employees. She testified, too, that there had not been any complaints made to her about her work while she was there. Neither of her two stays as respondent's temporary employee consisted of sixty work days.

Petitioner from December 21, 1994 through 1999 called, wrote and physically appeared at respondent's plant, asking to be rehired, stating that she had worked well while with respondent, and asking her former production department supervisor why it was that she was not being hired. Again, she was told that respondent was not hiring. In a letter he sent to her he reaffirmed that production help was not needed and said that, while her production work had been "ok", their present need was for sanitation work and that the supervisors of a company respondent engaged to do sanitation work had voiced dissatisfaction with her work for them. She learned that respondent had been hiring while stating that they were not and before initiating this action she filed on May 24, 1999, with the Pennsylvania Human Relations Commission and with the Equal Employment Opportunities Commission a charge of discrimination by respondent because of her national origin, religion and gender.

Petitioner filed with the Circuit Court after its affirmance of the district court's order a timely pro se motion to extend the time for the filing of a

petition for rehearing, explaining that her counsel had informed her that she no longer represented her and that she would need other counsel if she were further to appeal. That motion was granted and she filed a timely pro se petition for rehearing before the court en banc, which motion was denied.

This petition followed.

REASONS FOR GRANTING THE WRIT

The court below sanctioned so far a departure by the district court from the accepted and usual course of judicial proceedings of the type here involved as to call for and merit the exercise of this Court's supervisory power. We will first set forth what we submit the accepted and usual course to be and afterwards show how it was so far departed from below.

A. ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS. In summary judgment proceedings in actions against prospective employers under section 2002e-2 of the Civil Rights Act complaining of intentional discrimination because of race, color, national origin and gender in their refusal to hire, a plaintiff who has made a prima facie showing of such discrimination need only, after her employer proffers legitimate reasons therefor, point to some evidence, direct or circumstantial, from which a factfinder can reasonably disbelieve the defendant's articulated reasons. *Fuentes v. Perskie*, 32 F.3d 759, 764 (3d Cir., 1994) citing and following this Court's decision in *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 511, 113 S.Ct. 2742, 2749, 125 L.Ed. 2d 407 (1993). Accord: *Abramson v. William Paterson College of New Jersey*, 260 F.3d 265, 283 (3d Cir., 2001). While *Hicks* was not a summary judgment case, Justice Thomas's opinion therein, quoting in part from the circuit opinion therein "970 F.2d 487, at 493" it states, at the page just referenced:

> "The factfinder's disbelief of the reasons put forward by the defendant (particularly if disbelief is accompanied by a suspicion of mendacity)

> may, together with the elements of the prima facie case, suffice to show intentional discrimination. Thus, rejection of the defendant's proffered reasons will *permit* the trier of fact to infer the ultimate fact of intentional discrimination and the Court of Appeals was correct when it noted that, upon such rejection, '[n]o additional proof of discrimination is *required,*' . . ." [Emphasis added in original]

In *Fuentes*, as the Third Circuit Court of Appeals noted, 32 F. 3d at 764:

> "[B]ecause the factfinder may infer from the combination of the plaintiff's prima facie case and its own rejection of the employer's proffered non-discriminatory reasons that the employer unlawfully discriminated against the plaintiff and was merely trying to conceal its illegal act with the articulated reasons (citing *Hicks*), a plaintiff who has made out a prima facie case may defeat a motion for summary judgment by *either* (I) discrediting the proffered reasons, either circumstantially or directly, or (ii) adducing evidence, whether circumstantial or direct, that discrimination was more likely than not a motivating or determinative cause of the adverse employment action. Thus, if the plaintiff has pointed to evidence sufficiently to discredit the defendant's proffered reasons, to survive summary judgment the plaintiff need not also come

> forward with additional evidence of discrimination beyond his or her prima facie case. . . ."

Fuentes cited and properly relied upon this Court's decision in *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 255, 101 S.Ct. 1089, 1095, 67 L.Ed. 2d 207 (1981) wherein it is stated that a former female employee complaining of her employer's discrimination successfully carries the burden of demonstrating that the proferred reason was not the true reason for the employment decision "by persuading the court that a discriminatory reason more likely motif- ate the employer *or indirectly by showing that the employer's proffered explanation is unworthy of credence,* " [citing *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 804-805, 93 S.Ct. 1817, 1825-1826, 36 L.Ed. 2d 668 (1973)] [Emphasis added.]

Fuentes, in determining the quantum of evidence required, rejected out of hand what it said were the two extremes, namely, that plaintiff can avoid summary judgment simply by arguing that the factfinder need not believe the defendant's articulated explanations, on the one hand, *or that the plaintiff must adduce evidence directly contradicting the defendant's proffered legitimate explanations,* on the other. 32 F. 3d at 758. It ruled that to avoid summary judgment the plaintiff's evidence rebutting the employer's proffered legitimate reasons must allow a factfinder reasonably to infer that each of the employer's proffered non-discriminatory reasons was either a *post hoc* fabrication or otherwise did not actually motivate the employment action, i.e., was a pretext. It held: (32 F. 3d, at 759)

> ". . .[T]he non-moving plaintiff must demonstrate such weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in the employer's proffered legitimate reasons for its action that a reasonable factfinder *could* rationally find them 'unworthy of credence,' [citing authority] and hence infer 'that the employer did not act for [the asserted] non-discriminatory reasons." [Citing authority] [Emphasis in original]

It is against the preceding backdrop that this Court should determine whether, as we submit, the court below sanctioned so far a departure from the course of proceedings as to call for the exercise of its supervisory power.

B. UNACCEPTABLE AND UNUSUAL COURSE OF PROCEEDINGS BELOW. The district court's tendency to resolve doubt about material facts in favor of respondent, the moving party, is seen by the manner in which it addressed petitioner's challenge to respondent's claim that it did not permanently hire petitioner because of allegedly poor evaluations of her performance in sanitation work. Petitioner had pointed to evidence that respondent permanently hired a non-Asian-Muslim male, notwithstanding his allegedly poor performance in sanitation. The district court regarded this disparate treatment as "not helpful to plaintiff's case as defendant points out *in its reply brief*, Mr. Bobeck, as a member of the union, is subject to different standards than a temporary employee attempting to become a permanent employee." In an accompanying footnote, the district court added:

> "We note that *in his deposition testimony*, Mr. Maloney testified that he was uncertain about Mr Bobeck's union status at the time he received complaints concerning Bobeck's sanitation work. (See Doc. 24, Ex. A at 16. 'I don't remember the exact time, but he may have already been in the union, he may have already had his 60 days in.') However, the nature of Mr. Bobeck's union status was " *confirmed in defendant's reply brief*. (Doc. 25 at 13)." [Appendix B]

It is, indeed, a marked departure from the accepted and usual course of judicial proceedings to accept as confirmation of a witness' doubtful *testimony* about the possible status of an employee as a union member mere assertions appearing in a party's *brief*, let alone a *reply* brief to which there can be no answer. "A statement in a brief or in oral argument does not constitute evidence, for purposes of summary judgment." *Trap Rock Industries v. Local 825,* 982 F.2d 884, 892 (3d Cir. 1992), citing, quoting and following *Thornton v. United States,* 493 F.2d 164, 167 (3d.Cir. 1974). Moreover, the district court cited no authority, nor do we know of any, that recognizes the claimed right of an employer to discriminate in favor of a male employee by holding a female non-union member to an altogether different standard.

Petitioner, who could withstand summary judgment by demonstrating such weaknesses, implausibilities, inconsistencies "or contradictions" in the defendant's reasons for not keeping her on as a permanent employee as to make it possible for a reasonable factfinder rationally to find them unworthy of credence, pointed to a pre-litigation

letter from her supervisor while with respondent that stated that her work was "ok" and to the author's deposition testimony that characterized it as below average. The district court, instead of determining whether this constituted such a weakness, inconsistency or contradiction, said:

> "We *find* that the letter in question does not offer a clear evaluation of plaintiff's performance as a production worker. The fact that defendant's letter describes plaintiff's work as "ok" does not *mandate* the conclusion that the defendant was completely satisfied with plaintiff's production work. Moreover, the letter points out plaintiff's deficiencies as a sanitation worker and therefore supports defendant's articulated reason for not rehiring plaintiff as a sanitation worker." [Emphasis in original] [Appendix B]

The question which confronted the district court was not whether the letter mandated the conclusion that respondent was completely satisfied with petitioner's work, something petitioner was not obligated to show. The question was whether the supervisor's prelitigation letter and his postlitigation deposition testimony constituted such an inconsistency or contradiction as might prompt a reasonable factfinder rationally to find the testimony unworthy of credence or to infer that the employer did not act for the asserted non-discriminatory reasons. The Circuit Court, sanctioning this departure from the accepted and usual course of judicial proceedings, held that "the 'mandates' statement addressed petitioner's contention that the supervisor's testimony blatantly contradicted his pre-litigation letter, that the district court's response that the

letter saying her work was 'ok' did not blatantly contradict that later testimony, that it was a proper response and did not reveal an incorrect reading of the evidence." [Appendix A] Although we submit that his pre-and post-litigation stances were indeed contradictory, such "weaknesses, implausibilities, inconsistencies, incoherencies, *or* contradictions in the employer's proffered legitimate reasons for its action" that might prompt a reasonable factfinder rationally to find them unworthy of credence suffice to withstand summary judgment and were demonstrated.

Petitioner pointed to contradictions in the testimony of her supervisor while with respondent regarding whether the performance of a male employee, who was later permanently hired, was above or below average during his 60-day temporary hire. He was asked how Fred Bezick's performance during his initial hire was. He stated, "Above average." He testified that "the problem with Fred is his absenteeism." He added that, in determining whether an employee's performance is above or below average his actual job performance is combined with his absenteeism. He was then asked whether he considered Fred an above average employee during his first time as an employee and he answered "No." The district court, though charged to read the evidence in the light most favorable to the non-movant for summary judgment, said it did "not find this testimony to be clearly contradictory or helpful to plaintiff's pretext argument. We submit that it was both, and note that respondent's witnesses, two of its employees and hardly disinterested, had testified that petitioner sought as permanent employees only "above average" workers. If, as the supervisor testified, respondent permanently hired a male whom his supervisor deemed to be not above average, that certainly calls into question whether respondent

was guided by the "above average" standard which its own witnesses conceded to be subjective -- only when evaluating non-Asian-Muslim females. The Circuit Court did not address this contradiction or inconsistency or the district court's refusal to recognize it as such.

The Memorandum of the District Court states that the evidence indicates that petitioner's below average performance during her second period of employment, in conjunction with her poor performance as a sanitation worker for a company it retained to do sanitation work, resulted in petitioner's not being rehired as a sanitation worker by respondent. Such evidence as there was to that general effect was evidence favorable to the moving party that a factfinder would not be required to believe, especially under the circumstances here. This Court in *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 120 S.Ct. 2097, 147 L.Ed.2d 105 (2000) held that, while in entering a judgment as a matter of law, a court should consider all of the evidence in the record, it must draw all reasonable inferences in favor of the nonmoving party, it may not make credibility determinations or weigh the evidence, it must disregard all evidence favorable to the moving party that the jury is not required to believe, and should give credence to the evidence favoring the nonmovant as well as that evidence supporting the movant that is uncontradicted and unimpeached, *at least to the extent that that evidence comes from disinterested witnesses."* 530 U.S., at 150-151, 120 S.Ct. at 2109-2110. Here, the evidence favorable to the movant came from its own employees, not from disinterested witnesses, was oral, was unsupported by any documentary evidence and was belied by movant's own production records which, as the courts below noted, referred to petitioner's performance on several occasions as "good work." Instead of rejecting same, the district court in

finding that "the evidence indicates that [petitioner's] below average performance during her second period of employment . . . resulted in [her] not being rehired as a sanitation worker by the [respondent]" weighed the evidence and made credibility determinations. Moreover, petitioner had never asked to be hired as a sanitation worker and, in her two periods of temporary employment, had not been hired as such, but rather as a production worker. Respondent's production records, a part of the record below, reveal that she, like most production workers, was very rarely detailed to sanitation work and, although on those daily records opposite each worker's name there appear columns headed "clean," referencing sanitation work, and "problems", on none of those records on which do appear problems with other workers is any dissatisfaction with any of petitioner's work noted. The improper determination of the ultimate fact, i.e., that plaintiff was not rehired because of her earlier performance, is as unsupported by evidence that must be believed as it is improper.

Reeves, supra, after noting that review of Rule 50 [judgment as a matter of law and Rule 56 [summary judgment] motions is governed by the same standards, stated:

> "Whether judgment as a matter of law is appropriate in any particular case will depend on a number of factors. Those include the strength of the plaintiff's prima facie case, the probative value of the proof that the employer's explanation is false, and any other evidence that supports the

> employer's[1] case and that properly may be considered on a motion for judgment as a matter of law. . .It suffices to say that, because a prima facie case and sufficient evidence to reject the employer's explanation may permit a finding of liability, the Court of appeals erred in proceeding from the premise that a plaintiff must always introduce additional, independent evidence of discrimination."

530 U.S., at 148-149, 120 S. Ct. at 2108-2109.

Respondent advanced as a reason why it did not permanently hire petitioner that, when she, a production "Class 4" employee, was assigned during her initial temporary period to only a few hours of sanitation, Class 5", work, the Class 5 supervisor asked her Class 4 supervisor not to send her back. Petitioner's lower court counsel asked her supervisor during his deposition whether there were others he was asked by the Class 5 supervisor not to send back. He could not remember, but then did identify one such as the above named Bob Bobeck, whom he had sent to the sanitation department only to have its supervisor tell him "He cannot clean, don't send him to me anymore." He was hired; petitioner, though twice temporarily hired by respondent as a production, not sanitation, worker, was not. Such disparate treatment is such an inconsistency, if not contradiction, as could lead a reasonable factfinder rationally to find respondent's articulated reason for not hiring petitioner unworthy of credence or to infer that respondent did not act for the asserted non-

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[1]In *Reeves*, the movant for judgment as a matter of law under F.R.C.P. 50 was the employer, its motion was denied by the district court whose ruling thereon was reversed by the Court of Appeals which entered judgment for the employer.

discriminatory reasons it advanced. That is all a plaintiff complaining of intentional discrimination by her employer needs to show to withstand summary judgment, yet the summary judgment entered by a United States District Court against petitioner, a female Asian Muslim, and affirmed below.

The words Justice O'Connor used in *Reeves, supra*, when she discussed the factors that are taken into account in determining the appropriateness of the entry of judgment as a matter of law in employment discrimination cases fairly suggest the mandatory need that they be considered. She spoke of how that determination "will *depend upon* a number of factors [including] the strength of the plaintiff's prima facie case, the probative value of the proof that the employer's explanation is false, and any other evidence that supports the employer's case and that properly may be considered on a motion for judgment as a matter of law. The district court below concluded that petitioner had established a prima facie case of discrimination, one of the elements of which is that she was qualified for the job she sought and was denied, and the circuit court assumed from respondent's failure to contest that point on appeal that she had. But neither court found that her prima facie case was strong or weak. Although the district court's memorandum reveals that its author did not believe the employer's explanation to be false, its conclusion that certain of the alleged contradictions were not helpful to petitioner's case is clearly wrong and, in any event, he did not rule that all of them were lacking in probative value. As noted, the district court improperly accepted as true evidence favoring the summary judgment movant which he was not required to believe. Farida Rahman's hopes that this august Court will grant her petition are bolstered not only by the merits of her position as

supported by Justice O'Connor's opinion for the Majority in *Reeves* but also by her perception that hers may be the "appropriate case" envisioned by Justice Ginsburg in her concurring opinion in *Reeves*, when she wrote: [530 U.S., at 1543-155, 120 S.Ct. 2111-2112:

> ". . . [I]t may be incumbent on the Court, in an appropriate case, to define more precisely the circumstances in which plaintiffs will be required to submit evidence beyond these two categories . . .[evidence establishing a prima facie case and evidence from which a rational factfinder could conclude that the employer's proffered explanation is false] in order to survive a motion for judgment as a matter of law. I anticipate that such circumstances will be uncommon. As the Court notes, it is a principle of evidence law that the jury is entitled to treat a party's dishonesty about a material fact as evidence of culpability. (Citing *McDonnell Douglas, supra*) Under this commonsense principle, evidence suggesting that a defendant accused of illegal discrimination has chosen to give a false explanation for its actions gives rise to a rational inference that the defendant could be masking its actual, illegal motivation. *Ibid.* Whether the defendant was in fact motivated by discrimination is of course for the finder of fact to decide. (Citing *Hicks, supra*) But the inference remains – unless it is conclusively demonstrated, by evidence that the district court is required to credit on a

motion for judgment as a matter of law, . . . that discrimination could not have been the defendant's true motivation. If such conclusive demonstrations are (as I suspect) atypical, it follows that the ultimate question of liability ordinarily should not be taken from the jury once the plaintiff has introduced the two categories of evidence described above. Because the Court's opinion leaves room for such further elaboration in an appropriate case, I join it in full." [Emphasis added]

CONCLUSION

For the above reasons, this Court is respectfully asked to issue the requested writ of certiorari and to review the judgment sought to be appealed.

Respectfully submitted,

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Dated: September 11, 2003

APPENDIX A

NOT PRECENDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 02-1894

FARIDA B. RAHMAN,
Appellant

v.

CITTERIO U.S.A. CORPORATION

Appeal from the United States District Court
For the Middle District of Pennsylvania
(D.C. Civil No. 00-cv-01811)
District Court Judge: Honorable Edwin M. Kosik

Submitted Pursuant to Third Circuit LAR 34.1(a)
January 28, 2003

Before: SLOVITER and RENDELL, Circuit Judges, and DEBEVOISE, District Judge*

(Filed January 29, 2003)

OPINION OF THE COURT

RENDELL, Circuit Judge.

*The Honorable Dickinson R. Debevoise, Senior Judge, United States District Court for the District of New Jersey, sitting by designation.

Farida Rahman appeals the order of the District Court for the Middle District of Pennsylvania granting summary judgment for Citterio ISA Corporation ("Citterio") on her employment discrimination claims. Rahman is a Bangladeshi, Muslim female. She was hired by Citterio to work at its meat processing plant on a temporary basis from March 18, 1994 through May 20, 1994, and again from October 5, 1995 through December 21, 1994. Rahman worked at Proklean, an independent contractor with Citterio that provides sanitation services at Citterio's plant, from December 1996 through March 3, 1997. In 2000, Rahman commenced and action under Title VII of the Civil Rights Act of 1964 and 1991, and the Pennsylvania Human Relations Act, 43 Pa. C.S. § 951 et.seq., claiming Citterio discriminated against her on the basis of race, national origin, religion, and gender by not rehiring her between 1994 and 1999. The District Court granted Citterio's motion for summary judgment and we will affirm.

I. Jurisdiction and Standard of Review.

The District Court had jurisdiction over Rahman's federal claims under 28 U.S.C. § 1331 (2000) and 28 U.S. C. § 1343 (2000) and supplemental jurisdiction over her state claims under 28 U.S.C. § 1367(a)(2000). We exercise jurisdiction over the District Court's final order pursuant to 28 U.S.C. § U.S.C. § 1291 (2002). We exercise plenary review over the Court's grant of summary judgment, applying the same standard as the District Court. Abramson v. William Patterson College of N.J. , 260 F.3d 265, 276 (3rd Cir. 2001).

II. Discussion

Citterio concedes for this appeal that Rahman has made out a prima facie case, but contends that she has not rebutted it proffered reasons for not hiring her: her poor performance during her two temporary jobs at the plant and her poor performance at Proklean. Rahman has offered no direct evidence of discrimination and relies entirely on circumstantial evidence. Under the McDonnell-Douglas burden-shifting framework, Rahman bears the burden of rebutting Citterio's proffered legitimate reasons. To

meet this burden, she must "demonstrate such weaknesses, implausibilities, inconsistencies, or contradictions in [Citterio's] proffered legitimate reasons for its action that a reasonable factfinder could rationally find them 'unworthy of credence.'" Fuentes v. Perskie, 32 F.3d 759, 765 (3rd Cir. 1994).

Rahman argues that the District Court incorrectly viewed the evidence in the light most favorable to Citterio, and that she has shown enough inconsistencies in Citterio's position to allow a jury to find intentional discrimination. We disagree.

First, the District Court carefully evaluated each piece of evidence Rahman offered and found it wholly lacking. Rahman latches onto language in the Court's opinion stating that the fact that a letter from Rahman's manager describing her "work as 'ok' does not mandate the conclusion that [Citterio] was completely satisfied with [Rahman's] work," A17 (emphasis added), to argue that the Court was viewing the evidence in a light favorable to Citterio. Rahman cites to Abramson, 260 F.3d at 277, in which we reversed summary judgment because the district court had incorrectly framed its analysis in terms of whether "a reasonable person would 'necessarily construe' the conduct in question as being improperly motivated." However, a complete reading of the context of the District Court's statement reveals that the Court was not improperly framing the issue. The "mandates" statement was made in response to Rahman's assertion that the letter from her manager revealed a "blatant contradiction" between his pre- and post-litigation positions. The Court's response was that the letter saying her work was "ok" does not blatantly contradict his later testimony that her work was "below average". This was a proper response and does not reveal an incorrect reading of the evidence.

Second, having independently reviewed the record and taking the evidence in the light most favorable to Rahman, we agree with the District Court that she has not shown such inconsistencies that a reasonable factfinder could find in Citterio's reasons "unworthy of credence". Correspondence between her and her manager at Citterio prior to the initiation of her suit, A136, and her manager's testimony, A119, show that the manager did not think she performed

well enough in her sanitation jobs at the plant and with Proklean, and that she had to be reshown how to do jobs. A122. Although it is true that other people who were non-Muslim were retained or hired during the time period that Rahman sought a job, those employees performed better overall than Rahman or were union members. Rahman relies on her own belief that she was a good worker, and comments from Citterio that she was "average" during her first temporary job, but that is not enough to rebut evidence that Citterio clearly thought she was not performing well the second time she was hired at Proklean. There is simply nothing here from which to infer intentional discrimination.

Because we agree with the District Court that Rahman has not raised any genuine issues as to any material fact, we affirm the Court's grant of summary judgment to Citterio.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 02-1894

FARIDA B. RAHMAN,
Appellant

v.

CITTERIO U.S.A. CORPORATION

Appeal from the United States District Court
For the Middle District of Pennsylvania
(D.C. Civil No. 00-cv-01811)
District Court Judge: Honorable Edwin M. Kosik

Submitted Pursuant to Third Circuit LAR 34.1(a)
January 28, 2003

Before: SLOVITER and RENDELL, Circuit Judges,
and DEBEVOISE, District Judge*

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the Middle District of Pennsylvania and was submitted pursuant to Third Circuit LAR 34.1(a) on January 28, 2003. On consideration whereof, it is now here

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*The Honorable Dickinson R. Debevoise, Senior District Judge for the District of New Jersey, sitting by designation.

ORDERED and ADJUDGED by this Court that the Order of the District Court entered on March 26, 2002, be and the same is hereby AFFIRMED. All of the above in accordance with the opinion of this Court. Costs taxed against the Appellant.

ATTEST:

s/ Kathleen Brown
Chief Deputy Clerk

Dated: January 29, 2003

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

FARIDA B. RAHMAN,	:	
	:	
Plaintiff,	:	
	:	
	:	CIVIL ACTION NO.
v.	:	3:00-1811
	:	(JUDGE KOSIK)
CITTERIO U.S.A. CORPORATION,	:	
	:	
	:	
	:	
Defendant.	:	

MEMORANDUM

On October 13, 2000, plaintiff, Farida B. Rahman, filed the above employment discrimination action against defendant Citterio U.S.A. Corporation, pursuant to Title VII of the Civil Rights Act of 1964, 1991; the Pennsylvania Human Relations Act ("PHRA"), 43 Pa. C. S. §951 et. seq; and 42 U.S.C. § 1981. In her complaint, plaintiff alleges defendant discriminated against her because of her race, national origin, religion, and gender. Presently before the Court is defendant's Motion for Summary Judgment. For the reasons that follow, we will grant defendant's motion and close this case.

I. Background

Plaintiff, Farida Rahman, is an Asian-Muslim female who currently resides in White Haven, Pennsylvania. Defendant, Citterio U.S.A. Corporation ("Citterio"), is a meat processing plant located in

Freeland, Pennsylvania.

On March 18, 1994, defendant hired the plaintiff as a temporary Class Four production worker. A temporary employee could become a permanent employee after sixty working days, at which time he or she would be eligible for union membership. According to defendant's production reports, Ms. Rahman's responsibilities included packaging, slicing, washing, shipping, cleaning and peeling; the reports indicated on a few occasions that plaintiff's work was "good."

Plaintiff's direct supervisor was Hugh Maloney, who oversaw second shift production. On at least one occasion, plaintiff was assigned to sanitation work, and was supervised by Nick Evancho. Plaintiff continued in her position at Citterio until May 20, 1994, when she was laid off. Subsequently, plaintiff asserts she called and stopped by the plant to express her interest in returning to work, and was informed by Citterio that she need not submit a formal application for re-employment.

On October 5, 1994, defendant again hired the plaintiff for production work. On December 21, 1994, plaintiff was once again laid off. Plaintiff contends that she consistently reapplied for positions at defendant's business in 1994, 1995, 1996, 1997, 1998, and 1999, but was never again rehired by defendant. In mid-December 1996, however, plaintiff obtained a position with Prokleen, a subcontractor hired by defendant to do some of its sanitation work. Plaintiff did sanitation work for Prokleen at defendant's plant until March 3, 1997, when she was once more laid off.

The evidence submitted by the parties demonstrates that plaintiff made the following employment inquiries with the defendant. On April 2, 1997, Ms. Rahman sent a letter addressed to Greg Yackanicz[1], general foreman at Citterio, expressing her interest in a position with the company, and stating that she attempted to contact him several times. Plaintiff stated "I try to contact with you several times to let you know that I am interested to work again, I was told we

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[1] Mr. Yackanicz's responsibilities at Citterio include personnel matters.

are not hiring but we will keep you in mind. I fell [sic] very sad to know that since then you hire 19 workers permanently but I am not one of them although I am a very good worker and I show my interest time & time again." Plaintiff closed by stating "I understand my job at Citterio in [sic] your hand. I am desperately seeking your help. Please consider my matter with your gracious kindness...." (Doc. 20, Ex. B of Ex. A).

On May 15, 1997, plaintiff sent another letter to Mr. Yackanicz, asking him to look over her pay stubs from Prokleen. Additionally, plaintiff asked Mr. Yackanicz to review a "notice of determination" from the Job Center, and a reference letter. She declared that "Notice of determination sign [sic] by Robert J. Sturak proofs [sic] my separation with Prokleen USA is not my fault and Mr. James Curto's reference letter proofs [sic] I am a good worker."[2] In closing, she stated "...I hope you will be kind enough to consider me as a candidate in the future." (Doc. 20, Ex. A of Ex. A).

On April 22, 1998, plaintiff wrote a third letter to Mr. Yackanicz. Ms. Rahman began by claiming "Since I heard from you Hugh & Nick have something against me working at Citterio I requested several times to find out what they might have but unfortunately my requests were unanswered/ignored. I don't understand why they can't tell me if there is anything I did wrong...." In her deposition, plaintiff indicated that her letter referenced a previous telephone conversation she had with Mr. Yackanicz. During their conversation, plaintiff claims Mr. Yackanicz communicated that he hesitated to hire her because of something Mr. Maloney and Mr. Evancho said about her. Plaintiff's letter continued by pointing out that "19 workers were hired permanently in class four & five. Everytime [sic] I show my interest I was told we are not hiring but we will

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[2] During her deposition, Ms. Rahman testified that Robert Sturak was a representative at the job center through which plaintiff obtained employment at Prokleen, that the "notice of determination" was a reference to an Unemployment Compensation claim plaintiff filed, and that James Curto was plaintiff's former employer.

keep you in mind. Last temporary worker was hired but you didn't give me a chance. After Prokleen USA left you hire more workers but again you didn't give me a chance." Once more, Ms. Rahman asked Yackanicz to consider her as a candidate for employment. (Doc. 20, Ex. C of Ex. A).

The record also includes correspondence from defendant to plaintiff, dated May 30, 1998. The letter, purportedly authored by Nick Evancho and Hugh Maloney, [3] states that defendant did not have a problem with plaintiff's job as a production worker, and that she "did a ok job." The letter claims that at the time plaintiff was looking for work, Citterio was hiring only sanitation workers, and that while working for Prokleen as a sanitation worker, plaintiff "was not able to get the job done in a reasonable time." According to defendant, because of the imposition of new inspection procedures by the United States Department of Agriculture, defendant "could not take any chance with anyone," and hired only the "very best Pro-kleen [sic] employees." Defendant closed by informing plaintiff "If you were good at your job with Prokleen you would be working for us now. Sorry you took that job with Lee. We are not hiring production workers in Freeland at this time. If that was the case we would consider you." (Doc. 20, Ex. E).

On June 24, 1998, Ms. Rahman wrote to Hugh Maloney and Nick Evancho at Citterio. She confirmed receipt of the May 30, 1998 letter, which she claimed "put an innocent victim on trail [sic]." Ms. Rahman indicated that she felt the information in the May 30 th correspondence "does not add up to a good reason." "I know you hire some of Lee's workers and I also know you hire some of your workers from the street but again I did not get a chance although I have several years of previous experience with food service prior to work at Citterio." Plaintiff closed by stating "I believe in myself and I believe I should get a chance to work at Citterio."

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[3]During his deposition, Hugh Maloney testified that it was he, and not Nick Evancho, who wrote the letter to plaintiff. Mr. Maloney testified that Mr. Evancho had no involvement in writing the letter. (Doc. 24, Ex. A at 28).

(Doc. 20, Ex. D of Ex. A).

The last correspondence submitted to the Court between plaintiff and defendant is dated November 19, 1998, in which plaintiff informed Mr. Yackanicz that she had not received a response from Hugh and Nick, and again requested consideration for employment. (Doc. 20, Ex. E. of Ex. A).

On May 24, 1999, plaintiff filed a charge of discrimination against Citterio with the Equal Employment Opportunity Commission ("EEOC"). At that time, plaintiff also indicated that she wished to file a charge of discrimination concurrently with the Pennsylvania Human Relations Commission ("PHRC").

On October 13, 2000, plaintiff instituted the instant action. Defendant filed a motion for summary judgment on August 1, 2001. In its motion, defendant raises the following arguments in support of dismissal of plaintiff's case: (1) plaintiff has failed to establish a prima facie case of discrimination; (2) plaintiff has not shown that defendant's articulated legitimate reason for not hiring plaintiff was pretextual and (3) plaintiff did not make the requisite timely filing with the EEOC with respect to some of her claims. (Doc. 19). Appropriate briefs have been filed by the parties and the matter is ripe for disposition.

II Discussion

A. Standard of Review

Summary judgment is appropriate when "there is no genuine issue as to any material fact, and the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56 (c). When ruling on a motion for summary judgment, the court must view the record in a light most favorable to the non-moving party. Skerski v. Time Warner Cable Co., 257 F.3d 273, 278 (3d Cir. 2001). Moreover, the court must draw all reasonable inferences in favor of the non-movant. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255, 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1986).

The burden rests with the moving party to demonstrate that there is no genuine issue of material fact; thereafter, the non-moving party must counter

with evidence that supports each essential element of his or her claim. Skerski at 278, citing Pittston Co. Ultramar Am. Ltd. v.Allainz Ins. Co., 124 F.3d 508, 515 (3d Cir. 1997). The non-moving party must do "more than simply show that there is some metaphysical doubt as to the material facts," and where the record taken as a whole could not allow a rational fact-finder to find in favor of the non-moving party, summary judgment is appropriate. Matsushita Elec. Indus. Co. v. Zenith Radio, 475 U.S. 574, 587, 89 L. Ed. 538, 106 S. Ct. 1348 (1986).

B. McDonnell-Douglas framework

In McDonnell Douglas Corp. v. Green, 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973), the Supreme Court set forth the following framework to allocate the burdens and order of proof in cases in which a plaintiff seeks to prove discrimination through circumstantial evidence. First, a plaintiff must establish a prima facie case of discrimination, which gives rise to a legal presumption that the employer unlawfully discriminated against the plaintiff. Id. at 802. Once an employee establishes a prima facie case of discrimination, the burden shifts to the employer to articulate a legitimate, non-discriminatory reason for its decision. Id. The employer's burden is one of production; the employer must simply provide evidence which, taken as true, would allow the finder of fact to conclude there was a nondiscriminatory reason for not hiring the plaintiff. See Fuentes v. Perskie, 32 F.3d 759, 763 (3d Cir. 1994).

After the employer articulates a legitimate reason for its decision, the presumption of discrimination no longer applies. The burden shifts back to the plaintiff, who then must prove discrimination by a preponderance of the evidence. Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 256, 101 S.Ct. 1089, 1095, 67 L. Ed. 2d 207, 217 (1981). This may be done by showing either that the employer's proffered reason is a pretext for discrimination, or that discrimination was more likely than not a motivating factor in the employer's decision. Id. The analytic framework developed in McDonnell Douglas applies equally to the failure to hire,

retaliation, and §1981 claims asserted by the plaintiff. See McDonnell Douglas, 411 U.S. 792, Bazargani v. Haverford State Hosp., 90 F. Supp.2d 643, 653 (E.D. Pa. 2000), Stewart v. Rutgers, the State University , 120 F.3d 426, 432 (3d. Cir. 1997). Additionally, the McDonnell Douglas approach applies to plaintiff's state law claims under the PHRA. See Allegheny Housing Rehabilitation Corp. v. Pennsylvania Human Relations Comm'n, 516 Pa. 124, 128, 532 A.2d 315, 317 (Pa. 1987).

C. Analysis

Defendant's initial argument in favor of summary judgment is that plaintiff has failed to establish a prima facie case of discrimination. In a failure to hire case, a plaintiff may make a prima facie showing by demonstrating that (1) she belongs to a protected class; (2) she applied for and was qualified for a job for which the employer sought applicants; (3) plaintiff was rejected despite her

qualifications; and (4) after plaintiff's rejection, the employer continued to seek applicants with plaintiff's qualifications. Fuentes, 32 F 3d at 763.

Plaintiff and defendant agree that plaintiff is an Asian female from Bangladesh, and that she is Muslim. (Doc. 1; Doc. 4). In addition, the parties agree that defendant hired plaintiff as a production worker twice in 1994 (Doc. 19; Doc. 22). Similarly, it has been conceded that plaintiff sought to be rehired several times between 1994 and 1999, and that other non-Muslim individuals were, at minimum, hired between 1994 through 1995, a time when plaintiff made employment inquiries with defendant. (Doc. 1; Doc. 4).

Defendant's primary disagreement concerning plaintiff's prima facie case relates to her ability to show that she was qualified for the position. In response to defendant's motion, plaintiff has provided her deposition testimony that she is a "good worker," (Doc. 20, Ex. A. at 74), and points to a letter written by Hugh Maloney, which indicates he felt she did "a ok job" as a production worker. (Doc. 20, Ex. E). The production reports from plaintiff's second period of employment do not address her performance, although those from her initial hire indicate on a few occasions that plaintiff's work was

"good". (Doc. 26, Ex. A-1; Doc. 24, Ex. D). Establishing a prima facie case of discrimination under Title VII is not an onerous burden, see Ezold v. Wolf, Block, Schorr & Solis-Cohen, 983 F.2d 509, 523 (3d. Cir. 1992). This light burden, in addition to the requirement that we construe the record before us in a light most favorable to plaintiff, leads us to conclude that an issue exists as to whether or not plaintiff has established a

prima facie case of discrimination. Therefore, we will assume that plaintiff has met her burden and has established a prima facie case.

As explained above, the establishment of a prima facie case shifts the burden of production to the defendant, who must then articulate a legitimate, non-discriminatory reason for its hiring decision. McDonnell Douglas Corp., 411 U.S. at 802. In its Memorandum of Law In Support of Summary Judgment, defendant claims that plaintiff was not rehired because she received less favorable evaluations from her supervisor, Hugh Maloney, during her second period of employment as a production worker. (Doc. 19). Additionally, defendant argues that plaintiff performed poorly during her employment as a sanitation worker with Prokleen, and that defendant took this information into account in its decision not to rehire plaintiff for such work. (Doc.19).

Defendant supports its assertion through the deposition testimony of Hugh Maloney, who testified that he assessed plaintiff's production work during her second employment period as "below average" (Doc. 20, Ex. C at 31), and that he informed plaintiff in 1995 and 1996 that Citterio was not hiring or that she "wasn't what [Citterio] wanted," or "she didn't do the job [Citterio] needed." (Doc. 20, Ex. C at 32-33). Additionally defendant submitted a deposition from Greg Yackanicz, who testified that after his receipt of letters from the plaintiff, Mr. Yackanicz discussed plaintiff's situation with Mr. Maloney. (Doc. 20, Ex. D). According to Mr. Yackanicz, Mr. Maloney confirmed that he informed plaintiff that "we weren't going to consider hiring her again because we felt that she wasn't above average or a top performer. And also, that she had a chance with Proklean [sic], and that we had direct knowledge that she wasn't a good performer there

also...." (Doc. 20, Ex. D at 79).

A nondiscriminatory reason having been provided, under the framework set forth in McDonnell Douglas, the burden shifts back to the plaintiff. To survive a motion for summary judgment, the plaintiff must point to some evidence, direct or circumstantial, that would allow a reasonable trier of fact to conclude that either defendant's articulated reason is not true and thus, is a mere pretext for discrimination, or that discrimination was more likely than not a motivating factor in defendant's hiring decision. See Fuentes, 32 F.2d at 764. To demonstrate pretext, a plaintiff must do more than show that the employer's decision was wrong or mistaken; she must point out "such weaknesses, implausibilities, inconsistencies, or contradictions in the employer's proffered legitimate reasons for its action that a reasonable factfinder *could* rationally find them unworthy of credence...." Id. at 765. "It is not enough, in other words, to *dis*believe the employer; the factfinder must *believe* the plaintiff's explanation of intentional discrimination." See St. Mary's Honor Center v. Hicks, 509 U.S. 502, 519, 113 S.Ct 2742, 2754, 125 L. Ed. 407, 424 (1993).

Plaintiff in this case seeks to survive defendant's motion for summary judgment by rebutting defendant's assertion that plaintiff's performance during her second period of employment in conjunction with her work for Prokleen, were the reasons why she was not rehired by Citterio. (Doc. 22). To prove pretext, plaintiff points to a number of alleged contradictions in defendant's testimony, and to production reports commenting on plaintiff's work. (Doc. 22). However, for the reasons explained below, we find that the evidence offered by plaintiff could not allow a rational factfinder to conclude that defendant's proffered explanation is a pretext for discrimination, or that discrimination was more likely than not a motivating factor in defendant's decision not to rehire plaintiff.

At the outset, plaintiff draws attention to a "blatant contradiction" made by Hugh Maloney, who stated in a letter that plaintiff was an "ok" production worker pre-litigation, (Doc. 20, Ex. E) but then testified that her work was "below average" during his deposition. (Doc. 20, Ex. C at 31). (Doc. 22). We find that the letter in question does not offer a clear

evaluation of plaintiff's performance as a production worker. The fact that defendant's letter describes plaintiff's work as "ok" does not mandate the conclusion that defendant was completely satisfied with plaintiff's production work. Moreover, the letter points out plaintiff's deficiencies as a sanitation worker and therefore supports defendant's articulated reason for not rehiring plaintiff as a sanitation worker.

Additionally, plaintiff argues that production reports from her periods of employment with Citterio assist in proving that defendant's reasons for not hiring plaintiff are pretextual. As defendant points out, however, only the production reports from her first period of employment, from March 18, 1994 to May 20, 1994, indicate that her production work was "good." (Doc. 24, Ex. D). In contrast, the production reports from her second period of employment, from October 5, 1994 through December 21, 1994 do not indicate the quality of plaintiff's work. (Doc. 26, Ex. A-1). Therefore, the production reports do not support plaintiff's assertion that her performance was above average for that time period.

Plaintiff attempts to further show pretext by contrasting the deposition testimony of Mr. Yackanicz and Mr. Maloney. (Doc. 22). Specifically, plaintiff argues that Mr. Yackanicz testified that plaintiff performed below average during her *first* employment period, while Mr. Maloney testified that plaintiff's work was below average during her *second* employment period at Citterio. (Doc. 22). According to plaintiff, such contradictions "make it implausible to believe Defendant's proffered reason that Plaintiff was not hired because she performed 'below average' during her second period of employment with Citterio." (Doc. 22 at 13). Because plaintiff does not cite to the area of the record to which she refers, we read plaintiff's brief to refer to Mr. Yackanicz's deposition testimony that he was later informed by Mr. Maloney that plaintiff had not performed well in sanitation work during her first period of employment. (Doc. 20, Ex. D. at 54). Nonetheless, both Mr. Maloney's testimony and production reports indicate that plaintiff performed cleaning duties during her initial work period with Citterio. (Doc. 24, Ex. D; Doc. 20, Ex. C. at 14). Additionally, both Mr. Yackanicz's and Mr. Maloney's

testimony consistently state that plaintiff's work in sanitation was poor. (Doc. 20, Ex. D at 54; Ex. C at 14). Therefore, plaintiff's argument on this point is not supported by the record.

Another alleged contradiction to which plaintiff refers in Mr. Maloney's testimony concerns his evaluation of the work performance of Fred Bezick, an employee at defendant's plant. (Doc. 22). Mr. Maloney testified that the criteria used to evaluate an individual included (1) the ability to learn and perform a job, and (2) absenteeism. (Doc. 20, Ex. C at 9). Plaintiff, in her opposition brief, highlights the fact that Mr. Maloney testified that Bezick's performance was above average at Bezick's initial hire, but then Mr. Maloney testified that Fred had a problem with absenteeism and that Mr. Maloney did not consider him an above average employee at his initial hire. (Doc. 22). Again, we do not find this testimony to be clearly contradictory or helpful to plaintiff's pretext argument. Mr. Maloney's testimony indicates that he felt Bezick's *performance* was above average, but he did not think Bezick was above average in absenteeism. (Doc. 20, Ex. C at 9). When asked if he considered Bezick "an above average employee the first time," Mr. Maloney responded "No." (Doc. 20, Ex. C at 9). Thus, this testimony fails to assist plaintiff in meeting her burden of proving pretext.

Plaintiff also bases her pretext argument on testimony from Hugh Maloney that plaintiff's performance was "below average." (Doc. 22). Plaintiff states that "[i]n explaining how Plaintiff was allegedly 'below average,' Defendant points to the fact that Plaintiff 'showed an inability to learn jobs and had to have jobs reshown.'" (Doc. 22 at 14). Plaintiff argues that because Mr. Maloney testified that he could not remember what jobs he had to reshow plaintiff, that other workers sometimes had to be reshown jobs, and that he hired others in 1994 who had to be shown jobs more than once, this demonstrates that plaintiff was held to a different standard than other employees. (Doc. 22).

We find that plaintiff's argument on this matter is not supported by the record. Because we cannot locate the text directly quoted and cited by plaintiff, we read plaintiff's quotation of the record to refer to the pages of Mr. Maloney's deposition in which he testifies

regarding plaintiff's performance during her *second* period at Citterio.[4] Mr. Maloney testified as follows:

Q. And your assessment of the Plaintiff at the time of her second time with you, how did you assess her?

A. Below average, not as good as the first time.

Q. What happened during the second period that make [sic] her go below average?

A. I don't remember right now.

Q. But you remember that it was below average?

A. Otherwise I would have recommended her.

Q. But you cannot recall why she was below average?

A. I can't remember specific dates, times number of--

Q. I just want to know why she was below average? You don't have to give me dates and times.

A. Her inability to learn lots of jobs, having to re-show her jobs again.

Q: So the second time you had to show her jobs a second time?

A: I am sure I did because that's one of the things I consider, yeah. I don't remember which jobs now.

Q: And don't have any notes about this?

A: No.

(Doc. 20, Ex. C at 30-31).

Plaintiff then compares this testimony to defendant's earlier deposition testimony regarding plaintiff's initial hire, which is as follows.

Q: How was Plaintiff's performance at her initial hire?

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[4] In her brief, plaintiff quotes the defendant as stating plaintiff was below average because she "showed an inability to learn jobs and had to have jobs reshown." The citation plaintiff's counsel provides for this testimony is "Exhibit A pg. 7." There is no such testimony in plaintiff's Exhibit A, page 7. The testimony most closely resembling the cited testimony is found in Mr. Maloney's deposition on page 31, quoted above.

A: Average.
Q: What do you consider average?
A: Able to do most of the jobs, but several jobs I showed her, I'd have to show her again a second time, third time possibly...

* * *

Q: What jobs did you have to show her to do more than once?
A: I don't remember.
Q: But you recall that you did require –
A: Yes.
Q: But you don't actually remember which ones?
A: No.
Q: Did you ever have to show someone a job twice?
A: Sometimes.
Q: During 1994, did you ever hire someone that you had to show them a job more than once?
A: Yes.

(Doc. 20, Ex. C at 10-12).

As we indicated earlier, plaintiff was hired by defendant on two separate occasions. Although laid off, she was rehired. At no time was her race, national origin, religion, or gender in any way implicated. Defendant's proffered non-discriminatory reason for not hiring plaintiff relates to her performance during her second period of employment at Citterio, from October 5, 1994 through December 12, 1994, as well as her performance while working for Prokleen in December of 1996 through March 3, 1997. Mr. Maloney's testimony clearly states that he considered her an "average" employee during her initial work period, but that he did have to reshow her some jobs. (Doc. 20, Ex. C at 10-12). The fact that he had to redemonstrate jobs for others and hired others in 1994 who had to be reshown jobs, does not indicate that plaintiff was held to a different standard than others. In fact, the record clearly shows that plaintiff herself was rehired in 1994. Therefore, plaintiff's argument in this regard fails to show that defendant's articulated reason is a pretext for discrimination.

Finally, plaintiff disputes defendant's proffered non-discriminatory reason for not rehiring her by reference to the hiring or retention of two other employees. (Doc. 22). First, plaintiff argues that

discrimination is evident from the fact that defendant hired a male employee, Bob Bobeck, after he received poor evaluations regarding his performance in sanitation, "which allegedly was Plaintiff's problem." (Doc. 22 at 15). Nonetheless, this is not helpful to plaintiff's case because as defendant points out in its reply brief, Mr. Bobeck, as a member of the union, is subject to different standards than a temporary employee attempting to become a permanent employee. (Doc. 25 at 13).[5]

Plaintiff also raises the fact that defendant hired a white, male employee, Fred Bezick, "even though the temporary employee had an attendance problem and was 'okay.'" (Doc. 22 at 15). However, it is clear from the record cited by the plaintiff that Mr. Maloney testified that he felt Mr. Bezick's "[w]ork performance was above average," (Doc. 20, Ex. C at 30), but that when asked by Mr. Yackanicz about hiring additional people, Mr. Maloney recommended Bezick by telling Mr. Yackanicz that "Bezick was okay but missed some time." Therefore, plaintiff's contention on this point has no merit.

Having carefully reviewed all of plaintiff's arguments, in light of the instant record, we find that she has not rebutted defendant's articulated non-discriminatory reason for not hiring her after her second period of employment at Citterio. Plaintiff's assertion that she is a "good worker" (Doc. 20, Ex. A at 74), and that she believes she was discriminated against because of her gender, race, nationality, and religion (Doc. 24, Ex. F), is not borne out by the record and there is insufficient evidence by which a reasonable factfinder

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[5] We note that in his deposition testimony, Mr. Maloney testified that he was uncertain about Mr. Bobeck's union status at the time he received complaints concerning Bobeck's sanitation work. (See Doc. 24, Ex. A at 16, "I don't remember the exact time, but he may have already been in the union, he may have already had his 60 days in.") However, the nature of Mr. Bobeck's union status was confirmed in defendant's reply brief. (Doc. 25 at 13).

could conclude that Citterio's proffered reason is a pretext for discrimination. As reflected above, defendant hired the plaintiff on two occasions. The evidence indicates that plaintiff's below average performance during her second period of employment, in conjunction with her poor performance as a sanitation worker for Prokleen, resulted in plaintiff's not being rehired as a sanitation worker by the defendant.

To discredit defendant's explanation, plaintiff had to do more than "simply show the employer's decision was wrong or mistaken, since the factual dispute at issue is whether *discriminatory* animus motivated the employer, not whether the employer is wise, shrewd, or competent." Fuentes, 32 F.3d at 765 (emphasis added). Because plaintiff has not shown that genuine issues of material fact exist concerning defendant's proffered non-discriminatory explanation, we find that she has not produced the requisite evidence to survive defendant's motion for summary judgment, and we will grant defendant's motion as to all counts of plaintiff's complaint.[6] Further, because we find that plaintiff's action cannot withstand defendant's motion for summary judgment on the merits, we will not address defendant's final argument, namely, that some of plaintiff's claims are time-barred for failure to timely file her claims with the EEOC.

III Conclusion

For the reasons stated above, we will grant defendant's motion for summary judgment. An appropriate Order is attached.

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[6] As we indicated earlier, while plaintiff brings counts under the Pennsylvania Human Relations Act and 42 U.S.C. §1981, the same analysis applies to all of plaintiff's claims. Accordingly, we do not need to address these claims individually.

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

FARIDA B. RAHMAN,	:	
	:	
Plaintiff,	:	
	:	
	:	CIVIL ACTION NO.
v.	:	3:00-1811
	:	(JUDGE KOSIK)
CITTERIO U.S.A. CORPORATION,	:	
	:	
	:	
	:	
Defendant.	:	

ORDER

AND NOW, this _____ day of March, 2002, IT IS HEREBY ORDERED THAT:

[1] defendant's motion for summary judgment (Doc. 13) is granted;

[2] judgment is hereby entered in favor of the defendant and against the plaintiff; and

[3] the Clerk of Court is directed to close the case.

_____
Edwin M. Kosik
United States District Judge

APPENDIX C

Ms. Marcia M. Waldron, Clerk
U S Court of Appeals for the Third Circuit
21400 U.S. Courthouse
610 Market Street
Philadelphia PA 19106-1790

Re: Rahman v. Citterio USA Corp.
Docket No. 02-1894

Dear Ms. Waldron:

I am requesting more time (45 days if possible) to file papers for rehearing, because at this time I am without an attorney. Cynthia L. Pollick, Esquire is not willing to represent me any more in this matter. I received the Court Order on February 5, 2003, and talk to a few attorneys, but no one is available to help me in short time.

Please give me more time so that I can find an attorney who will be able to help me in this matter.

Thank you.

Sincerely,
s/ Farida B. Rahman
Hickory Hills, Box 78
White Haven, PA 18661
(570) 443-4468
February 8, 2003

Certification of Service

I hereby certify that the within pleading is being filed and served upon all other parties to this action within the time period allowed by the U.S. First Class Mail, Postage prepaid.

s/ Farida B. Rahman
Hickory Hills, Box 78
White Haven, PA 18661
(570) 443-4468

Dated: February 8, 2003.

APPENDIX D

Marcia M. Waldron, Clerk
U S Court of Appeals for the Third Circuit
21400 U.S. Courthouse
610 Market Street
Philadelphia PA 19106-1790

Re: Rahman v. Citterio USA Corp.
Docket No. 02-1894
Reply Certification

Dear Ms. Waldron:

Enclosed please find a copy of the letter dated February 3, 2003, from attorney Cynthia L. Pollick in which she is saying that , "I no longer represent you in this matter, and if you want to take any further appeals, you need to find other counsel."

Also enclosed please fine a copy of the letter dated February 11, 2003, from the other party in which they falsify information once again, and object to my request, which should be thrown out, and I believe lying in Court of law should be punishable.

Please give me more time (45 days if possible) so that I can find an attorney who will be able to help me.

Thank you.

Sincerely,
s/ Farida B. Rahman

February 16, 2003

CERTIFICATION OF SERVICE

I hereby certify that the within pleading is being filed and served upon all other parties to this action by the U.S. First Class Mail, Postage prepaid.

s/ Farida B. Rahman
Hickory Hills, Box 78
White Haven, PA 18661
(570) 443-4468

Dated: February 16, 2003

APPENDIX E

UNITED STATES DISTRICT COURT FOR THE THIRD CIRCUIT

February 12, 2003

No. 02-1894

FARIDA RAHMAN, Appellant

v.

CITTERIO U.S.A., CORPORATION

(Middle Dist of PA (Scranton) Civil No. 00 cv-01811) (EMK)

PRESENT: Rendell, Circuit Judge

Letter Motion by Appellant Pro Se for 45 day extension of time to file Petition for Rehearing.

s/ Debra D. Wall 267-299-4934
Quality Assurance

Response due 2/24/03

O R D E R

The foregoing
Motion is granted.

Petition is due to be filed on April 1, 2003.

By the Court,

s/ Marjorie O. Rendell
Circuit Judge

Dated Feb 20, 2003
dw/cc: FBR
JMG

THE EMPLOYMENT LAW FIRM
Greater Pittston Professional Center
126 S. Main Street, Suite 201
Pittston PA 18640
(570) 654-9675
FAX: (570)654-5021
Cynthia L. Pollick, Esquire
LL.M. in Trial Advocacy
Also admitted in New Jersey

February 3, 2003

VIA CERTIFIED AND REGULAR MAIL

Ms. Farida Rahman
Box 78
Hickey Hills
White Haven PA 18661

RE: Rahman v. Citterio

Dear Farida:

Enclosed please find the decision from 3d Circuit, which I spoke about during our telephone conference today. As I stated in our telephone conference, I no longer represent you in this matter, and if you want to take any further appeals, you need to find other counsel.

If you have any questions, please feel free to contact me.

Very Truly Yours,

s/ Cynthia L. Pollick, Esquire

CLP\lc
Enclosures

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February 11, 2003

Ms. Marsha M. Waldron
Clerk
United States Court of Appeals for the Third Circuit
21400 U.S. Courthouse
601 Market Street
Philadelphia PA 19106-1790

Re: Rahman vs. Citterio U.S.A. Corp.
No. 02-1894

Dear Ms. Waldron:

I am in receipt of Farida B. Rahman's correspondence dated February 8, 2003 (in which she requests an extension of time to "file papers for rehearing"). Please be advised that on behalf of Appellee, Citterio U.S.A. Corp., we object to same as Ms. Rahman has counsel of record and we do not believe there is a just reason for there to be an extension of time.

I appreciate your kind attention to this matter.

Very truly yours,

LAPUTKA, BAYLESS, ECKER & COHN, P.C.

s/John M. Gallagher

JMG:tld

cc: Cynthia L. Pollick, Esquire
Ms. Farida B. Rahman
Mr. Michael Zieminski
Robert S. Sensky, Esquire

APPENDIX F

SUR PETITION FOR REHEARING
WITH SUGGESTION FOR REHEARING IN BANC

The petition for rehearing filed by appellant having been submitted to all judges who participated in the decision of this court, and to all the other available circuit judges in active service, and a majority of the judges who concurred in the decision not having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is hereby DENIED.

BY THE COURT:

s/ Marjorie O. Rendell
Circuit Judge

Dated: June 24, 2003
DW/cc: FBR
JMG

APPENDIX G

42 U.S.C.A. § 2000e-2

UNITED STATES CODE ANNOTATED
TITLE 42. THE PUBLIC HEALTH AND WELFARE
CHAPTER 21--CIVIL RIGHTS
SUBCHAPTER VI--EQUAL EMPLOYMENT OPPORTUNITIES

§ 2000e-2. Unlawful employment practices

(a) Employer practices

It shall be an unlawful employment practice for an employer—

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

(b) Employment agency practices

It shall be an unlawful employment practice for an employment agency to fail or refuse to refer for employment, or otherwise to discriminate against, any individual because of his race, color, religion, sex, or national origin, or to classify or refer for employment any individual on the basis of his race, color, religion, sex, or national origin.

(c) Labor organization practices

It shall be an unlawful employment practice for a labor organization--

(2)

Supreme Court, U.S.
FILED
OCT 27 2003
OFFICE OF THE CLERK

No. 03-455

In the

Supreme Court of the United States

FARIDA RAHMAN,

Petitioner,

v.

CITTERIO U.S.A. CORPORATION,

Respondent.

Petition for a Writ of Certiorari to the
United States Court of Appeals for the Third Circuit

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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RESTATEMENT OF QUESTIONS PRESENTED FOR REVIEW

1. Whether the United States Court of Appeals for the Third Circuit departed from the accepted and usual course of judicial proceedings by affirming the United States District Court for the Middle District of Pennsylvania, which granted Respondent's Motion for Summary Judgment in Petitioner's Employment Discrimination Claim?

CORPORATE DISCLOSURE STATEMENT

Citterio U.S.A. Corporation hereby discloses that it is a Pennsylvania company, that there are no parent corporations to Citterio U.S.A. Corporation, and there are no publicly-held companies which own 10% or more of Citterio U.S.A. Corporation's stock

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

COUNTER-STATEMENT OF THE CASE

Factual History

Farida B. Rahman ("Rahman") first applied for a position with Citterio U.S.A. Corporation ("Citterio") through a referral from the local Job Center (unemployment office) in March of 1994. She was subsequently hired on March 18, 1994 by Citterio. The position was temporary, which classification was known to Rahman. Rahman worked at this position through May 20, 1994 at which point she was laid off. During Rahman's employment with Citterio there were no racial or religious utterances or slurs made against her by any Citterio employees or management. During Rahman's first temporary employment with Citterio as indicated herein, she was described as an "okay"/or "average" worker.

Rahman was called back by Citterio on October 5, 1994 and worked through December 21, 1994 when she was again laid off. It was during the second period of employment with Citterio that Rahman alleges she realized Citterio had discriminated against her on the basis of race, religion and gender. Rahman based this belief of Citterio having already hired several other individuals, and did not hire her even though she was interested and available. During Rahman's second period of employment, her work was considered below average.

Following Rahman's separation from employment on December 21, 1994 with Citterio, she never made a formal job application to Citterio. Rahman claimed she called the plant several times and talked to various members of management and sent letters to Citterio. However, she was unclear as to whether or not she sent letters during the time period from December 21, 1994 through December of 1996. In December of 1996, Rahman obtained employment through The Job Center (unemployment office) with a company called Pro Kleen performing sanitation work in the Citterio building, though not as an employee of Citterio. Rahman worked for Pro Kleen within the Citterio premises from mid-December of 1996 through March 3, 1997 when she was laid off by Pro Kleen, who is not a party to this action. Since Rahman's layoff from March 3, 1997 by Pro Kleen, she has made several attempts via correspondence to gain employment with Citterio. The correspondence consists of letters dated May 15, 1997; April 12, 1997; April 22, 1998; June 24, 1998; and November 19, 1998. Rahman further claims to have made verbal applications for employment on December 15, 1998 and February 5, 1999. Due to Rahman's average to poor work performance during her two temporary employment periods with Citterio, as well as her poor evaluation during her employment with Pro Kleen in Citterio's facility, no position was offered.

REASONS FOR DENYING THE WRIT

The issue presented by the Petition appears to be whether the Third Circuit Court of Appeals abused its discretion in affirming the decision and order of the United States District Court for the Middle District as it relates to employment discrimination cases. The Third Circuit Court of Appeals affirmed the Middle District Court's decision consistent with both the decided case law of this Honorable Court and of other Circuit Courts. The principal purpose for which the United States Supreme Court uses certiorari jurisdiction is to resolve conflicts among Circuit Courts of Appeals and State Courts concerning meaning of provisions of federal law. Braxton vs. U.S., 500 U.S. 344 (1991).

A. THE DISTRICT COURT AND THE COURT OF APPEALS APPROPRIATELY FOLLOWED THE MCDONNEL DOUGLAS TEST.

This Court recently reaffirmed the McDonnel Douglas analysis in Reeves vs. Sanderson Plumbing Productions, 147 L.Ed.2d 105 (2000). The McDonnel Douglas test requires that:

> (1) The Plaintiff must establish a prima facie case of discrimination, i.e., (a) That he is a member of a protected class; (b) That he applied for a position or promotion for which he was qualified; (c) That his application was rejected; (d) That the employer continued to consider

or promote applicants of equal qualifications who are not in a protected class.

(2) If the Plaintiff succeeds in showing prima facie case, the burden shifts to Defendant to produce evidence that the Plaintiff was rejected or someone else was preferred for a legitimate non-discriminatory reason. "This burden is one of production not persuasion; it can involve no credibility assessments".

Reeves at 117 (internal quotations omitted).

(3) If the Defendant meets this burden by offering admissible evidence sufficient for the trier fact to conclude that the Plaintiff was rejected or someone else was preferred for a legitimate non-discriminatory reason, the McDonnel Douglas frame work with its presumptions and burdens disappears. The Plaintiff is left with the responsibility to prove by a preponderance of the evidence that the legitimate reasons offered by the Defendant were not its true reasons but were a pretext for discrimination. Id.

At the District Court, Citterio essentially conceded the elements regarding whether Rahman established a prima facie case. The argument at the summary judgment level focused on prongs two and three of the McDonnel Douglas analysis.

B. THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT APPROPRIATELY AFFIRMED THE DISTRICT COURT'S ORDER ENTERING SUMMARY JUDGMENT ON BEHALF OF CITTERIO AS NO GENUINE ISSUE OF MATERIAL FACT EXISTED AFTER APPLYING THE MCDONNEL DOUGLAS ANALYSIS.

Applying the second prong of the McDonnel Douglas analysis, Citterio produced evidence that Rahman was rejected due to evaluations performed by her Supervisor, Hugh Maloney. After her initial work periods with Citterio in 1994, less favorable evaluations were the reason why she was not offered a position. In Rahman's later applications or inquiries for employment to Citterio, these evaluations were also taken into account as well as her work for Pro Kleen within Citterio's facility. The evaluations by Rahman's supervisors provided a legitimate non-discriminatory reason for the rejection of Rahman's various applications for employment and/or inquiries of employment over a five-year span. In her Petition before this Court, Rahman urges this Court to reverse both the District Court and Court of Appeals' because of a purported, unacceptable and unusual course of proceedings below.

Rahman's attempt to show that the lower courts misapplied the standard is enunciated by this Honorable Court should fail. In short, Rahman attempts to show that an alleged contradiction in testimony of Citterio's witnesses demonstrates Citterio's proffered reason for not hiring Rahman was pretextual. Specifically, Rahman alleges the testimony of Hugh Maloney contradicted itself in that he testified at one point that Rahman was an "okay" worker and later stated Rahman was a below-average worker. However, this was a complete misreading of the record as noted by the District Court and the Third Circuit Court of Appeals. In actuality, the record indicated the testimony of Citterio's witnesses consistently stated Rahman was an average worker during her first period of employment. Furthermore, Citterio's employees' testimony is also clear and consistent Rahman was a below-average worker during her second period of employment. Additionally, the record is clear that Rahman's performance with Pro Kleen on the Citterio premises was also poor.

As argued in her Petition, Rahman attempts to show Citterio's witnesses' testimony contradict each other as to whether Rahman was a below-average worker during her first period with Citterio.Rahman alleges her supervisor's own testimony contradicts itself regarding the criteria used in evaluating work performance. However, Rahman clearly misconstrues the testimony of her supervisor regarding evaluation criteria. Her supervisor testified that an evaluation of an employee has two separate components, specifically: performance and absenteeism. Additionally, her supervisor testified performances are evaluated by the employee's ability to adapt and to learn various jobs.

In applying this standard to Rahman and two other employees, who were in fact hired, during the first temporary employment period with Citterio, her supervisor concluded that one was above-average in performance but below-average in attendance. The other, however, was considered above-average in both performance and attendance.

We turn to the third prong of McDonnel Douglas. Rahman made one statement in an attempt to prove that the legitimate reason offered by Citterio for its non-hire of Rahman was a pretext for its discrimination. That was "I am a good worker". Rahman's self-appraisal of her work ability does not create a genuine issue of material fact, nor does her own self-serving remarks standing alone raise sufficient doubt as to the credence of Citterio's explanation for her termination and later failure to rehire. Forsythe vs. Board of Education, Unified School District No. 489, 956 F. Supp. 927, 934 (D Kansas 1997); citing Schultz vs. General Electric Capital Corporation, 37 F.3d 329, 334 (7th Cir. 1994) and Furr vs. Seagate Technology, Inc., 82 F.3d 980, 988 (10th Cir. 1996) see also, Healy vs. New York Life Insurance Company, 860 F.2d 1209 (3rd Cir. 1988), *cert. denied*, 490 U.S. 1098 (1989) (where Plaintiff is unable to point to specific evidence casting doubt on employer's articulated nondiscriminatory reason for termination, entry of summary judgment in employer's favor was appropriate); Billet vs. Cigna Corp., 940 F.2d 812, 816 (3rd Cir. 1991) (in order to prove pretext, Plaintiff must adduce sufficient evidence that employer's articulated reason is unworthy of credence.).

A clear view of the record indicates the only weaknesses, implausibilities, inconsistencies, incoherence, or contradictions presented by Rahman are in her own arguments. She bases her assertions on fabrications of fact not in the record. Furthermore, she misconstrues clear testimony in a manner which no reasonable fact finder could possibly interpret as discriminatory intent. Though Rahman attempts to chip away by way of purported inconsistencies in Citterio's employee's testimony, she is unable to prove any discriminatory intent other than her assertion that she was an "okay" worker.

CONCLUSION

This case does not merit further review by this Honorable Court. For the foregoing reasons, Petitioner's Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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